NO. 22428

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FAUSTINO RAFAEL MURGIA-MELENDREZ,

Petitioner,

vs.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON APPEAL FROM THE BOARD OF IMMIGRATION APPEALS, UNITED STATES DEPARTMENT OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE

BRIEF FOR THE RESPONDENT

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ISSUES PRESENTED

1. Was there an intelligent waiver of counsel by the petitioner at his deportation hearing on June 26, 1967?
2. Is Section 242(b)(2), Immigration and Nationality Act (8 USC 1252), and implementing regulation 8 CFR 242.16(a), constitutional?

STATUTES INVOLVED

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252, provides in part:

" . . . Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that

. . .

"(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose; . . . "

Section 242(b)(2) is implemented in part by 8 CFR 242.16(a) which provides in part:

"(a) Opening. The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; . . ."

Section 292 of the Immigration and Nationality Act, 8 U. S. C. 1362, provides:

"SEC. 292. In any exclusion or deportation proceedings before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose."

Section 292 is implemented by 8 CFR 292.5(b).

"Right to representation. Whenever an examination is provided for in this chapter, the person involved shall have the right to be represented by an attorney or representative who shall be permitted to examine or cross-examine such person and witnesses, to introduce evidence, to make objections which shall be stated succinctly and entered on the record, and to submit briefs."

ARGUMENT

I

THE PETITIONER WAS OFFERED BUT DECLINED THE PRIVILEGE OF BEING REPRESENTED BY COUNSEL.

At his deportation hearing, with regard to counsel, the petitioner was advised by the Special Inquiry Officer as follows (Transcript pages 22-23):

"Q In these proceedings, you have the right

to be represented by counsel or other authorized representative of your choice, but at no expense to the United States Government. Have you obtained representation for this hearing?

"A Not for this hearing, sir.

"Q Are you willing to proceed with the hearing of this matter at this time without representation?

"A Yes, sir.

"Q You are also informed that during this proceeding you have certain rights including the right to inspect, examine and object to any evidence offered against you by the Government, to cross-examine any witnesses that the Government may present, and to present evidence for yourself. Do you understand?

"A Yes, sir."

In addition, regulations require that if there is personal service of the Order to Show Cause the respondent alien is to be advised of the contents of the Order to Show Cause; that any statement he makes may be used against him; and of his right to be represented by counsel of his own choice, without expense to the Government [8 CFR 242. 1(c)]. The reverse side of the Order to Show Cause (Exhibit 1, Transcript page 33a) reflects that the Order to Show Cause was served on petitioner by mail.

The Order to Show Cause states in part:

"If you so choose, you may be represented in this proceed-

ing, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing." (Transcript p. 33a)

The fact that Petitioner presented a letter which was admitted into evidence (Transcript page 45, Exhibit 4) is some indication that he read and understood the foregoing quotation from the Order to Show Cause which had been served on him.

After completion of the hearing and decision adverse to the Petitioner, he employed counsel in connection with appeal to the Board of Immigration Appeals. The sole attack upon the deportation proceeding before the Board of Immigration Appeals is the same as in this action before this Court. That is, a non-intelligent waiver of counsel as well as a claim of violation of the Constitution in allegedly depriving petitioner of right to counsel. In fact, the brief for this Petitioner before the Board of Immigration Appeals is for the most part identical to the brief filed by counsel

in this litigation. (Transcript pages 6-17). The Board of Immigration Appeals pointed out that it does not rule on constitutional questions, but found no difficulty in overruling counsel's contention that petitioner did not understand the nature of the deportation proceeding, or the advice given him with regard to having counsel at his own expense. (Transcript pages 2-3).

Under the circumstances where the advice given to the respondent alien was strikingly similar to the warning given in this case, the Ninth Circuit Court of Appeals stated with regard to Section 242(b)(2) - (Millan-Garcia v. Immigration and Naturalization Service, 343 F. 2d 825, 829 (9th Cir. 1965); remanded on other grounds, 382 U. S. 69):

> "It is clear that the privilege of being represented by counsel expressed in the statute cited above is one which may be waived in a deportation proceeding. Giaimo v. Pederson, 289 F. 2d 483, (6th Cir. 1961); United States ex rel. Dentico v. Esperdy, 280 F. 2d 71, (2nd Cir. 1960); United States ex rel. Mustafa v. Pederson, 207 F. 2d 112, (7th Cir. 1953); Coons v. Boyd, 203 F. 2d 804, (9th Cir. 1953) Cf. Samala v. Immigration and Naturalization Service, 336 F. 2d 7, (5th Cir. 1964). It is apparent from the transcript of the proceedings at both the March 24th hearing and during the resumption of the hearing on April 3rd, that the petitioner voluntarily and understandingly waived the privilege of representation by retained counsel. Since there is nothing to indicate that petitioner was unable to

afford a lawyer, no other question is presented.

> "Petitioner argues that he was not granted a reasonable continuance of the hearing proceedings to employ counsel of his own choosing. But petitioner does not assert that a request was at any time made for such a continuance nor does the record reflect any such request. It does not appear that petitioner has made any effort to secure counsel or that he desired one. When questioned by the special inquiry officer regarding representation by counsel, petitioner indicated that he was willing to proceed without counsel." (at pages 829-830)

The Court's attention is specifically referred to cases cited in the above quotation.

Petitioner concedes that the Special Inquiry Officer informed him that he had a right to be represented by counsel or other authorized representatives of his choice. He also admits that the Officer sought to determine whether he had obtained representation for the hearing. The petitioner chose, however, to proceed without representation. The fact that he knowingly and voluntarily chose to waive his right to counsel in no way invalidates the hearing. See Giaimo v. Pederson, 289 F. 2d 483, 484 (6th Cir. 1961) and cases cited above. Thus, a hearing cannot be said to be unfair on the grounds of lack of counsel where there is a voluntary waiver of that right. U. S. ex rel. Jankowski v.

Shaughnessy, 186 F. 2d 580 (2nd Cir. 1951). Nor will a hearing without counsel pursuant to a waiver constitute a lack of due process. U. S. ex rel. Dentico v. Esperdy, 280 F. 2d 71 (2nd Cir. 1960).

II

SECTION 242(b)(2) DOES NOT REQUIRE THAT AN ATTORNEY BE PRESENT AT EVERY DEPORTATION PROCEEDING.

In the instant case, the Petitioner at no time indicated he was indigent. It does not appear from the record that Petitioner could claim that he was indigent since he was working (Transcript page 31) and living with his parents (Transcript page 30).

The presence of counsel is a privilege that the alien may elect to exercise. In a case (as in this case) where the alien was not represented at the hearing but was represented before the Board of Immigration Appeals and in court, the Ninth Circuit Court of Appeals stated (Bisaillon v. Hogan, 257 F. 2d 435 (9th Cir. 1960), cert. den. 358 U. S. 872):

> "Appellant was by no means an indigent person, nor was she a defendant in a criminal case. She had counsel of her own choosing, not only before the Board of Immigration Appeals, but before the district court and here. She could as readily have obtained counsel to represent her before the special inquiry officer."
> (at page 437)

The Special Inquiry Officer did not deny petitioner the privilege of having counsel, and he was under no duty, nor is he authorized, to appoint counsel. In fact, the law makes no provision of payment for attorney fees by the Government (See Burr v. I. N. S., 350 F. 2d 87, 91 (9th Cir. 1965)).

The mere fact that the alien is a minor does not make his waiver of counsel invalid. The court will take into consideration his education, intelligence, information, understanding, and ability to comprehend [DeSouza v. Barber, 263 F. 2d 470 (9th Cir. 1959), cert. den. 359 U. S. 989].

Although the alien undergoing deportation proceeding may not elect to employ counsel, the courts generally will evaluate the hearing to determine whether the absence of representation resulted in a lack of fair hearing [Ellis v. Berman, 238 F. 2d 235 (2nd Cir. 1956); see also Rose v. Woolwine, 344 F. 2d 993, 4th Cir. 1965)]. See generally Gordon and Rosenfield, Immigration Law and Procedure (1967) Section 1. 23(a) "Right to representation by counsel," pages 1-87-94.

In the instant case, the evidence against the Petitioner was documentary. This evidence, even if Petitioner had elected to remain silent, could have been established readily as relating to Petitioner. Consequently, the absence of counsel did not prejudice him. It was not testimony from the alien which provided the basis for the deportation charge -- it was the visa which established his alienage (Transcript pages 34-40, Exhibit2), and the record of conviction which established the substantive charge (Transcript

pages 41-44, Exhibit 3). Consequently, the Petitioner cannot show that he was prejudiced by the absence of counsel at the hearing and/or that the hearing was unfair.

III

SECTION 242(b)(2) AND THE IMPLEMENTING REGULATION ARE CONSTITUTIONAL.

In the case of Nason v. I. N. S., 370 F. 2d 865, (2nd Cir. 1967), the court stated it was for Congress to prescribe the standards affecting the fairness of a deportation hearing. The court stated as follows:

> "Although the consequences of deportation are in many instances of very serious moment to the deportee, a deportation proceeding has uniformly been held to be civil and not criminal in character. Fong Yue Ting v. United States, 149 U. S. 698, 13 S. Ct. 1016, 37 L. Ed. 905 (1893); Buagewitz, v. Adams, 228 U. S. 585, 33 S. Ct. 607, 57 L. Ed. 978 (1913); U. S. ex rel. Bilokumsky v. Tod, 263 U. S. 149, 44 S. Ct. 54, 68 L. Ed. 221 (1923); Harisiades v. Shaughnessy, 342 U. S. 580, 72 S. Ct. 512, 96 L. Ed. 586 (1952); Woodby v. Immigration and Naturalization Service, 385 U. S. 276, 87 S. Ct. 483, 17 L. Ed. 2d 362, decided December 12, 1966. It is, moreover,

within the competency of the Congress to prescribe rules and regulations affecting the fairness of a trial of disputed issues of fact, such as the burden of proof, the admissibility of evidence and the right of the deportee to counsel. In the absence of congressional action such questions have been traditionally 'left to the judiciary to resolve * * in the interest of the even-handed administration of the Immigration and Nationality Act.' Woodby v. Immigration and Naturalization Service, supra." (at page 868)

In the case of Ah Chiu Pang v. INS, 368 F. 2d 637 (3rd. Cir.1966), cert.den. 386 U. S. 1037, the court said:

"Petitioner also challenges the constitutionality of the order of deportation on the ground that when he was apprehended he was not afforded the benefit of counsel and notification of his constitutional rights as required in criminal cases by Escobedo v. State of Illinois, 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and Massiah v. United States, 377 U. S. 201, 84 S. Ct. 1199, 12 L. Ed. 246. At the oral argument here, petitioner's counsel frankly conceded that no decision supported this argument, but that he was impelled to make the contention to preserve the record. The same argument was made before the Board of Immigration Appeals and we, like

it, are not prepared to extend to aliens in deportation proceedings the same immunities to be accorded defendants in criminal cases as claimed by petitioner." (At page 639)

Although these two cases (Nason and Ah Chiu Pang) involve the right to counsel during the preliminary investigation, as distinguished from the right to counsel during the formal hearing before the Special Inquiry Officer as in the case now before the court, they nevertheless are clearly in point. [See also Burr v. I. N. S., 350 F. 2d 87, 91 (9th Cir. 1965)].

It would appear that if a failure to inform an alien during the investigation into his deportability that he may have counsel is not violative of the Constitution, that the explicit statutory provisions providing that he may have counsel, at no expense to the Government, during the administrative hearing, should withstand the requirements of due process provisions of the Fifth Amendment.

The Supreme Court long ago stated that a proceeding to enforce regulations relating to the right of aliens to reside in the United States is not a criminal prosecution within the meaning of the Fifth and Sixth Amendments; that all that is required is that the alien have a fair hearing [Zakonaite v. Wolf, 226 U. S. 272 (1912); see also, Bridges v. Wixon, 144 F. 2d 927, 931 (9th Cir. 1944), reversed other grounds 326 U. S. 135].

There is a long-established thesis that deportation pro-

ceedings are civil in nature and therefore are not governed by the principles pertinent to criminal prosecutions. See Fuentes-Torres v. I. N. S., 344 F. 2d 911 (9th Cir. 1965), cert. denied 382 U. S. 846 (1965); Ben Huie v. I. N. S., 349 F. 2d 1014 (9th Cir. 1965).

However, the courts have recognized that an alien who is within our borders is entitled to the protection of the Fifth Amendment as it concerns procedural due process [Chew v. Colding, 344 U. S. 590 (1953)]. Deportation, although it may visit hardship and deprivation upon a person, is not a criminal proceeding, and has never been held to be punishment [Carlson v. Landon, 342 U. S. 524, 537-8 (1952)].

Although the Supreme Court has pointed out the severity of deportation and prescribed a rigid standard of proof for the issuance of deportation orders, it still has refused to hold that a deportation proceeding is a criminal prosecution. [Woodby v. Immigration Service, 385 U. S. 276, 285 (1966)].

It cannot be said that what is a fair hearing (as measured by the due process clause of the Constitution) is static; however, what Congress adopted in Section 242(b) as the basic formula for a fair hearing, is in accord with the concepts of the courts as well as the Administrative Procedures Act [Marcello v. Bonds, 349 U. S. 302 (1955)].

CONCLUSION

It is respectfully submitted that, based upon the prior decisions of this Court, Courts of Appeals in other circuits, and the United States Supreme Court, the Board of Immigration Appeals correctly dismissed Petitioner's appeal, and that decision should be affirmed by this Court.

Respectfully submitted,

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